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No. 42

Supreme Court of the United States

OCTOBER TERM—1939

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP and DR. MAXIMILIAN GOLDSTEIN,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONERS.

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INDEX

PAGE

POINT I. Wiretapping provisions of Section 605 apply to intrastate as well as interstate communications 1

A. The Language of the Statute shows that it applies to intrastate communications 1

B. The Government's argument based upon the "legislative history" of Section 605 is beside the point 4

C. Petitioners' construction of Section 605 would not render the statute unconstitutional 5

D. The purpose of the statute, as revealed by the evils which it was designed to remedy, shows that it applies to intrastate communications .. 6

POINT II. The interception and divulgence of the communications were not "authorized by the sender" 6

POINT III. The evidence derived from intercepted telephone communications was inadmissible because obtained and received in violation of the Fourth and Fifth amendments to the Constitution of the United States 7

POINT IV. The challenged testimony was not admissible if the Federal Communications Act or the Fourth and Fifth amendments be construed to bar introduction into evidence of intercepted intrastate telephone communications 9

Conclusion 12

TABLE OF CASES:

Agnello v. United States, 269 U. S. 20 (1925) 7

Nardone v. United States, 302 U. S. 379, 382-3 ..... 4, 5, 7

United States v. Lee, 274 U. S. 559 (1927) 8

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REPLY BRIEF ON BEHALF OF PETITIONERS.

POINT I.

Wiretapping provisions of Section 605 apply to intrastate as well as interstate communications.

A. The Language of the Statute shows that it applies to intrastate communications.

The Government attempts to base its argument against the adoption of the construction of the statute advocated by petitioners both upon the context of provisions of the Communications Act other than Section 605 (Govt. Br. pp. 16-20) and upon the language of Section 605 itself (Govt. Br. pp. 20-25). The first branch of the argument has, for the most part, been anticipated and refuted in petitioners' main brief (pp. 15-18). One additional refinement may be noted. The Government argues (Govt. Br. pp. 18-19) that the failure of Section 3 of the Act (Title 47 U. S. C. §153) to define the

word "communication" in some way indicates that that word, as used in Clause 2 of Section 605, refers only to interstate communications. The argument is faulty in its premise as well as in its conclusion. It may be noted that Section 3 of the statute specifically defines "wire communication" and "radio communication". Inasmuch as these are the only "communications" with which the statute is concerned, it would seem to follow that the word has been sufficiently defined for the purposes of the statute. In any event, failure to provide any additional definition of the word "communication" can have no possible bearing upon the scope of that term as used in Section 605.

Furthermore, it appears that the Government has wholly failed to answer petitioners' argument (Pet. Br. pp. 17-18) to the effect that, granting that the primary purpose of the statute is to protect interstate and foreign communications, it is, nevertheless, obvious that such communications cannot be effectively protected without also prohibiting the interception and divulgence of all communications regardless of their origin. The Government's attempted answer (Govt. Br. pp. 32-35) is that Clause 2 of Section 605 in reality prohibits only "divulging" of intercepted communications and that, as thus construed, it is unnecessary to include intrastate communications within the scope of the prohibition in order effectively to protect interstate communications. Such a contention is manifestly unsound. Not only is a prohibition against divulging in fact necessary in order to accomplish complete protection (Pet. Br. p. 18), but, more important, it would seem to be clear beyond argument that the statute prohibits not only divulging but interception as well. Reference by the Government to the different language of earlier statutes and regulations (Govt. Br. pp. 33-35) cannot alter this conclusion.

With regard to the meaning to be derived from a construction of the language of Section 605 itself, the Govern-

ment's Brief (p. 22) advances certain arguments which seem to us to fall short of the mark. Thus, the Government contends that petitioners' construction of the Section would lead to the result that the interceptor of an intrastate communication is not forbidden to use the information for his own benefit. In the first place, such a result would not follow, inasmuch as Clause 4, which relates to intercepted communications, specifically prohibits such use. In any event, even if this were not the case, it is apparent that the result which the Government has presupposed is in no sense peculiar to petitioners' construction but would be equally applicable to the construction which the Government adopts. Thus, even if Clause 2 of Section 605 related only to interstate communications, as the Government contends, it would still be equally true, on the Government's premise, that an interceptor of interstate communications would not be forbidden to use the information for his own benefit. Clause 3 would not prevent such use, since that Clause does not relate to intercepted communications. Hence, the result, as far as the use of communications for the interceptor's own benefit is concerned, would be the same, regardless of the scope of Clause 2.

Similarly unsound is the Government's contention that petitioners' construction would lead to the conclusion that, although an employee of a transmitting agency is not forbidden to use or publish intrastate communications (Clause 1 being limited to interstate and foreign communications), nevertheless, a person "having become acquainted" with the contents of such a communication from an employee would be prohibited from using or publishing it under Clause 4. Such a result would not follow inasmuch as Clause 4 in terms refers only to persons who have become acquainted with the contents of "intercepted" communications. Hence, the provisions of Clause 4 are in no way related to, or inconsistent with, the provisions of Clause 1 relating, not to in-

terception, but to divulging by employees of transmitting agencies.

Finally, the Government contends that the failure to use the limiting words "interstate and foreign" in Clause 2 of the Act was caused by the fact that the draftsman of the Act "evidently believed" that the use of those words in Clause 1 carried over to Clause 2 (Br. p. 24). Obviously, if this were so, the draftsman would not have repeated the phrase "interstate and foreign" in Clause 3, but would have assumed that that phrase carried over, not only to Clause 2, but throughout the Section. The fact of significance is that the draftsman did not rely upon any such "carry over" principle but specifically inserted the phrase of limitation in the Clauses which do not deal with interception and refrained from using such limitation in the Clauses which do deal with that subject.

B. The Government's argument based upon the "legislative history" of Section 605 is beside the point.

This argument comes down to the contention that the purpose of Congress in passing the Communications Act of 1934 was merely to transfer to the newly created Federal Communications Commission the authority over wire and radio communications which had previously been vested in part in the Federal Radio Commission and in part in the Interstate Commerce Commission. If this were so, it would, of course, follow that the statute was not intended to deal with the subject of wiretapping at all, regardless of the nature of the communications intercepted. But, this Court, in the *Nardone* case, held exactly to the contrary. In fact, this Court there expressly rejected the Government's similar argument based on legislative history holding that "these circumstances are, in our opinion, insufficient to overbear the plain mandate of the statute" (*Nardone* v. *United States*, 302 U. S. 379, 382-3).

Furthermore, it is worthy of note that the Government's brief wholly ignores the one factor in the history of Section 605, which seems to us to have any real importance. Section 27 of the Radio Act of 1927, upon which the present Section 605 was based, nowhere contained the limiting phrase "interstate or foreign". In drafting the present statute, on the contrary, this phrase was inserted in Clauses 1 and 3 of the Section and omitted from Clauses 2 and 4 (See Petitioners' Br. p. 19).

C. Petitioners' construction of Section 605 would not render the statute unconstitutional.

Although the Government suggests, without arguing the point, that petitioners' construction would be of doubtful constitutionality (Govt. Br. p. 42), it would appear that the Government has nowhere attempted to answer petitioners' argument (Pet. Br. p. 21) which would seem to be conclusive upon the constitutional point, namely, that Congress may regulate intrastate commerce whenever that is reasonably necessary as a means of exercising effective control of interstate and foreign commerce.

Furthermore, the Government has not refuted petitioners' contention (Pet. Br. p. 22) that the Section could be sustained in any event as embodying a rule of evidence for the Federal courts. The Government argues (Govt. Br. p. 35) that the *Nardone* decision does not establish that the Section constitutes "a rule of evidence *per se*". And, yet, at the same time, the Government admits that the "effect of the decision of this Court in the *Nardone* case was to render inadmissible in a Federal criminal prosecution interstate telephone communications intercepted by Federal officers" (p. 35). The distinction, if any exists, seems too fine. By "rule of evidence" we mean merely a rule which renders evidence inadmissible. The *Nardone* case, as we understand it, held squarely that Section 605, in effect, creates such a rule.

D. The purpose of the statute, as revealed by the evils which it was designed to remedy, shows that it applies to intrastate communications.

We find no passage of the Government's brief which directly attempts to answer this argument, set forth on pages 23-28 of petitioners' brief. It is indeed suggested in another connection (Govt. Br. p. 48) that although wiretapping is susceptible of abuse, nevertheless, "the individual cannot isolate himself from a minimum of social supervision". We deem it unnecessary to elaborate upon the dangerous implications of such an argument.

POINT II.

The interception and divulgence of the communications were not "authorized by the sender".

The Government's argument on this point (Govt. Br. pp. 43-46) has already been anticipated and refuted in petitioners' main brief (pp. 28-32). It may be pointed out that the Government's argument is based upon the fundamental misconception heretofore noted, namely, that Section 605 is directed only against divulging and not against interception as such. Obviously, if this premise be unsound, as we believe it is, the entire argument falls without need of further discussion, inasmuch as it cannot even be contended by the Government that the original interception of the conversation was authorized by either party to them.

It may also be noted for the sake of completeness that the Government's contention that one party to the conversation shall be deemed to be the "sender" depends upon the argument that at common law either party to a conversation may testify to it without the consent of the other. Obviously, this common law principle has no bearing upon the interpretation of the word "sender" as used in the statute.

Finally, it should be observed that the Government's argument in this connection cannot apply in any event to Exhibit 307, a conversation the interception and divulgence of which, the Government concedes (Govt. Br. p. 45), was not authorized by either party thereto. This conversation happens to be the only one between two of the petitioners. For this reason, as well as because of its contents, its importance may not be minimized. It was apparently deemed sufficiently weighty to justify its use among the thousands available, and the Government may not reasonably argue now that it should be overlooked.

POINT III.

The evidence derived from intercepted telephone communications was inadmissible because obtained and received in violation of the Fourth and Fifth amendments to the Constitution of the United States.

Here the Government relies in the main upon the majority view in the *Olmstead* case, whereas petitioners have urged that this Court now adopt the views there expressed by the dissenting justices. One or two statements in the Government's brief deserve mention here. Thus, it is manifestly inaccurate to contend (Govt. Br. p. 50) that "The *Nardone* decision itself embodies a reaffirmation of the holding in the *Olmstead* case". The Nardone decision neither reaffirms nor repudiates the doctrine of the *Olmstead* case since in the *Nardone* case the Court was concerned solely with the construction of Section 605.

The two cases cited by the Government (p. 49) with reference to the question of search and seizure are not in point here. Thus *Agnello* v. *United States*, 269 U. S. 20 (1925) was a case in which the conviction of the defendant for con-

spiracy to violate the Federal Narcotic Act was reversed on the ground that evidence had been improperly admitted because it had been obtained through an illegal search of the defendant's home without a warrant, in violation of the Fourth Amendment. The holding of the case therefore, if relevant at all, would seem to support the petitioners', rather than the Government's, contention.

United States v. *Lee*, 274 U. S. 559 (1927) involved primarily the question of whether Federal officers may legally apprehend an American vessel on the high seas. The question of illegal search and seizure was only briefly referred to by the Court in holding that no such question was presented inasmuch as the Federal officers had not searched the vessel but had merely looked at it from the deck of a Government vessel. The fact that in order to see it was necessary to use a light, inasmuch as the incident occurred at night, is of no significance. The situation was in no way analogous to that presented by a case of wiretapping in which Federal officers have, in effect, projected themselves within a defendant's home.

Mention may also be made of the Government's argument, which we feel to be somewhat strained, to the effect that the including of wiretapping within the ban of the Fourth and Fifth Amendments would render it impossible for Congress in the future to permit that practice to any extent, even under proper safeguards. Such a question goes far beyond the scope of the present case and need not be here decided, but it would seem that, viewed as an abstract proposition, it would be entirely possible for Congress to amend the statute to permit wiretapping by Federal officers, if it so desired, under proper requirements as to the obtaining of a warrant, etc. Indeed, as the Government itself points out, a bill to that effect has already been considered by Congress (Govt. Br. pp. 38-9).

POINT IV.

The challenged testimony was not admissible if the Federal Communications Act or the Fourth and Fifth amendments be construed to bar introduction into evidence of intercepted intrastate telephone communications.

The Government makes a belated attempt (Br. pp. 59-63) to avoid the entire issue as to the construction to be given to the Communications Act and the Fourth and Fifth Amendments by contending that such questions are not presented by this record since "the witnesses who testified to the telephone communications at the trial were parties to the conversations" (p. 60). It is said that the admission of such testimony may be justified on common law principles either on the theory that it constituted a refreshing of the witnesses' recollection or on the theory that the records and transcripts constituted a memorandum of past recollection recorded. Such an argument completely ignores the theory upon which the evidence was offered and received at the trial. What actually occurred is briefly as follows:

The witness Nelson was first shown Government's Exhibit No. 110 for identification, a stenographic transcript of a telephone conversation had between Nelson and Mrs. Messman (R. 33-5). The witness testified that he had heard a phonographic record of that conversation played to him outside of Court and that he had corrected the stenographic transcript of the conversation, where necessary, to conform to the phonographic record (R. 35). The witness then testified in response to questions by the Court that although he could give the substance of the conversation from memory, without reference to the transcript, he could not give the conversation word for word (R. 36). Thereupon, over objection and exception of defense counsel, the Court permitted the witness to testify to the precise words of the conversation, "refreshing

his recollection" from the stenographic transcript (R. 44). In fact, the Court, in effect disregarding the fiction of "refreshing", directed the witness to read the transcript word for word to the jury (R. 44).

Thus far it might possibly be said, as the Government contends, that in pure theory, such testimony consisted of the witness's own recollection of the conversation, as "refreshed" by an unidentified paper. It is unnecessary to argue the point, however, for the fact of cardinal importance is that the Government did not follow the same procedure with respect to all the other intercepted conversations which it introduced.

Immediately after the incident just described, the Government offered in evidence a phonographic record and corresponding stenographic transcript of a totally different conversation, one between Nelson and Dr. Messman held on January 9, 1937 (R. 46). In this instance, the Government made no attempt to pursue the fiction of refreshing the witness's recollection as to the contents of the conversation. The witness was not even asked whether he could recall the substance of the conversation, let alone the precise words (R. 54-5). He testified merely that he had heard the phonographic record played and corrected the stenographic transcript to correspond to it (R. 54-5). Both the transcript and the phonographic record were then offered in evidence and upon the objection of defense counsel that no foundation had been laid, inasmuch as the witness had not testified that he did not recall the substance of the conversation independently of the documents (R. 55), the Assistant United States Attorney stated:

> "I do not have to ask him that. I am not offering it on that theory. I am offering it on the theory that is *independent corroboration*". (Italics ours.)

Petitioners' objection was thereupon overruled and both the phonographic records and the stenographic transcript were admitted (R. 55-6).

The same method was followed with respect to each of the 75 remaining conversations. In each instance the witness merely testified that he had "followed the same procedure", that is to say, that he had heard the record played to him and had compared it with the stenographic transcript.

It thus appears that this evidence was not offered or received on the theory that it either refreshed the recollection of the witness or recorded a transaction which he had originally known but as to which he had no present recollection. It was offered as "independent corroboration" of the witness's testimony as to his transactions with the defendants. It is simply not true that the testimony was "the testimony of the witness" or that its weight depended "on his credibility" (Govt. Br. p. 62). The phonographic records and transcripts constituted independent evidence in precisely the same manner as if they had been identified, not by a witness who said he had heard them played outside the courtroom, but by the Federal officer who intercepted the communications and by the persons who prepared the phonographic records and transcripts. Moreover, the Government called as witnesses, the officers who had intercepted the conversations and prepared the records, and they testified in detail as to the exact procedure followed (R. 64-92). There cannot be the slightest doubt that everyone in the courtroom, court, jury and counsel on both sides, understood that evidence was being introduced of telephone conversations, which had been intercepted by means of wiretapping, and that the authenticity of such evidence depended upon the accuracy of the methods employed in intercepting the conversations and recording them both mechanically and stenographically. Counsel for the Government claimed as much in his summation (R. below 2510). No one present could have conceived for one moment that the testimony consisted merely of the recollection of a party to the conversation or that the records consisted merely of a memorandum of his previous recollection.

Moreover, wholly apart from the foregoing, such use of the records of the intercepted communications was clearly a violation of Clause 4 of Section 605, which prohibits any person "having received such intercepted communication or having become acquainted with the contents" thereof to divulge or publish it or "use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto".

The admission of this evidence squarely raised the questions of the construction to be given to the Communications Act and the Fourth and Fifth Amendments. To contend otherwise is merely a belated and fallacious effort to avoid consideration of those important questions on their merits.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed because of the admission of concededly prejudicial evidence obtained in violation of Federal and State Law and in violation of the Fourth and Fifth amendments to the Constitution of the United States.

New York, November 9, 1939.

Respectfully submitted,

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